No. 15953

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable James Alger Fee, Richard H. Chambers, and Stanley N. Barnes:

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal.

Jurisdictional Statement.

The appellant was convicted by a jury trial in the United States District Court for the Southern District of California, Southern Division, and on January 8, 1959, the judgment on appeal reversing the conviction was filed by this Honorable Court.

Grounds for This Petition.

Appellee respectfully urges the Court to grant this Petition for Rehearing primarily on the grounds that the Court has misunderstood or has been misled and misad-

vised as to the duration of the continuing duty of this appellant to report for induction into the Armed Forces as ordered to do by his local board.

Preliminary Statement.

The necessary facts in the case for purposes of this Petition may be succinctly stated as follows:

November 8, 1955: Appellant ordered to report for induction.

December 19, 1955: Appellant became 26 years of age.

April 1956: Appellant claims he first learned of the order to report for induction.

This Court recognized, acknowledged and affirmed the proposition that appellant had a continuing duty to report for induction.

> "The trial court laid great weight in the instructions upon the continuing duty of Venus to report for induction after the critical date specified in the order. We take no exception to this instruction standing alone. *There is generally such a duty.*" (Emphasis ours; p. 3 of the slip opinion of the judgment on appeal.)

This Court then undertook to ascertain the duration of this continuing duty.

(Quotation No. One)

> "There is doubt whether there was any machinery by which he (appellant) could have been legally inducted subsequent to that date (the date appellant became 26)." (Pp. 3-4, slip opinion of judgment on appeal.)

(Quotation No. Two)

"It is perfectly plain that no one connected with the Local Board would send him (appellant) to an army receiving station: first, because he was over twenty-six years of age when he wrote to the Board in April 1956, and no one knew then and no one pretends to advise this Court now as to whether the Board had authority to order him to report for induction after he had attained the age, . . ." (P. 4, slip opinion of judgment on appeal.)

(Quotation No. Three)

"There was also a continuing duty to report certainly on November 8, 1955, and thereafter for some considerable time, if Venus obtained knowledge of the terms of the order at a time when this obligation was incumbent upon him. But the duty to report was not unlimited. Venus became twenty-six years old on December 19, 1955." (P. 5, slip opinion of judgment on appeal.)

Appellee respectfully urges that these three quotations from this Court's opinion are predicated upon misunderstanding of the applicable law and regulations or upon a lack of knowledge of the existence of a controlling fact present in the case but not called to the Court's attention, namely: That appellant, under the law and regulations, has extended liability to age 35 because he had received a deferment prior to attaining the age of 26.

Armed with this fact, appellee respectfully submits the answer to the questions raised in each of the "three quotations" above; first, there is no doubt that appellant could be legally inducted into the armed services after he became 26 years old because his liability to serve is extended to age 35; second, the Local Board does have authority to order appellant to report for induction after he attained

the age of 26; third, appellant's duty to report for induction continues past the age of 26 because appellant is liable for the draft until he becomes 35 years old. (Authorities cited below.)

It appears to appellee that, due to the above referred to misunderstanding or lack of factual knowledge, this Court was mistaken in its opinion, and this mistake permeates the entire judgment on appeal as it affected the Court's discussion on the jury instructions. Appellee submits that this Court would affirm the judgment below if it had been made aware of appellant's extended liability.

Argument and Authorities.

Appellant's Selective Service File [Ex. 1 in the trial court and part of the record on appeal] indicates that appellant had, *inter alia,* the following classifications:

1. October 27, 1950: Appellant was classified III-A and remained in this classification until November 7, 1951:

2. February 27, 1952: Appellant was classified II-A and remained in this classification until September 24, 1952;

3. October 15, 1952: Appellant was again classified II-A and remained in this classification until January 7, 1953.

These facts are not contested; in fact, they are set forth in Appellant's Brief on page 6.

50 U. S. C. A. Appendix 456(h) provides in pertinent part:

> "(h) The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces . . . of any or all categories of persons whose

employment in industry, agriculture, or other occupations or employment, . . .; *and provided further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces . . . until the thirty-fifth anniversary of the date of their birth."

This law became effective on June 19, 1951. The Selective Service System acting under the authority of 50 U. S. C. A. Appendix 460 promulgated pertinent regulations pertaining to deferments as follows:

"32 C. F. R. 1622.1 *General principles of classification.* (a) The Universal Military Training and Service Act, as amended, provides that every male citizen of the United States . . . who is between the ages of 18 years and 6 months and 26 years, shall be liable for training and service in the Armed Forces of the United States, and that persons who on June 19, 1951, were, or thereafter are, deferred under the provisions of section 6 of such act shall remain liable for training and service until they attain the age of 35."

"32 C. F. R. 1622.22. *Class II-A: Registrant deferred because of civilian occupation (except agriculture and activity in study).* In Class II-A shall be placed any registrant whose employment in industry, or other occupation or employment . . . is found to be necessary to the maintenance of the national health, safety, or interest."

"32 C. F. R. 16.2230. *Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship and privation to dependents.* . . . (b) In Class III-A shall be placed any registrant whose induction into the Armed Forces would result in extreme hardship and privation (1) to his . . . parent. . . ."

See also:

32 C. F. R. 1622.50.

It is clear from the foregoing law that appellant was in fact deferred on three separate occasions, and, thus, by law he has extended liability to age 35.

Judges Stephens, Fee, and Chambers had occasion to apply this law in *Kaline v. United States,* 235 F. 2d 54, 62 (1956). In that case the Court held that Regulation 32 C. F. R. 1622.50 "extended the liability of a registrant to age 35 if *at any time* on or after June 19, 1951, he was in a deferred class." (P. 63.)

This holding, applied to the instant case, gives rise to just one conclusion: Appellant has extended liability to age 35.

United States v. Cook, 225 F. 2d 71 (3 Cir., 1955), cert. den. 350 U. S. 937 (1956), dealt with this same question of extended liability to age 35 and, in essence, concluded that even though a registrant had passed his 26th birthday at the time he was ordered inducted, the induction was legal as the registrant had extended liability to age 35.

Conclusion.

Appellee respectfully concludes as follows:

1. Appellant was deferred prior to attaining the age of 26 years; hence, had extended liability to age 35.

2. Appellant had knowledge of the order to report for induction at a time when this obligation was incumbent upon him.

3. This Court misconstrued the law applicable to extended liability and continuing duty, and this misconstruc-

tion vitally affected this Court's discussion of the jury instructions.

4. This Court should grant appellee's Petition for Rehearing, and then affirm the judgment below or allow counsel for both sides to submit new briefs on the issue, followed by oral argument.

Respectfully submitted,

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Assistant U. S. Attorney,

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United States of America.

Certificate of Counsel.

Thomas R. Sheridan, one of the attorneys for the appellee, hereby certifies that in his opinion the above Petition for Rehearing is well founded and not interposed for delay.

THOMAS R. SHERIDAN,
Assistant U. S. Attorney.